No. 6588

In the United States Circuit Court of Appeals for the Ninth Circuit

GILBERT JOHNSON, APPELLANT,

v.

UNITED STATES OF AMERICA

BRIEF FOR THE UNITED STATES

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I

APPELLANT WAS NOT PREJUDICED BY THE USE IN THE INDICTMENT OF EXPRESSIONS COMPLAINED OF.

The chief assignment of error relied upon by appellant herein lies in the use of various expressions in the indictment; namely, the words "embezzle," "confidence man," and "swindler." It is urged that this tends, on the one hand, to degrade the defendant to his prejudice, and on the other, to charge him with the crime of embezzlement.

In describing a scheme to defraud in an indictment under Section 215, it is necessary to advise the defendant of the character of the scheme with such definiteness and precision that he properly can prepare his defense.

It is required in pleading the defendant's false representations to negative them with particularity. This is evidenced by the case cited by the appellant in his brief, namely, *Beck* v. *United States,* 33 F. (2d) 107, wherein the court says on page 109:

> It is true that * * * a pleader should not only allege the falsity of the misrepresentations, but allege affirmatively in what the falsity consisted.

It was proper and necessary to allege in connection with the description of the scheme to defraud that the money which defendant planned to obtain from the victims would be appropriated to his own use instead of being applied to the purposes which these representations described. Such intent as to appropriation was part of the scheme. Therefore, it was well pleaded. It is obvious that the term "embezzle" was used only in describing in particularity a portion of the scheme involved.

Appellant also insists that he has been gravely prejudiced by the use of the term "confidence man" and "swindler."

If this be true, then appellant might argue with equal logic and reason that he had been prejudiced by the very fact of being indicted.

However, the use of these terms is solely in connection with the falsity of the representation lettered (c) of the indictment, as follows:

> To the effect that Gilbert Johnson (meaning, thereby, the defendant), of Gilbert

> Johnson and Company, and president of the big, successful Johnson Oil Company, is president and general manager of the Fernando Oil Company, which in itself assures a competent administration of the affairs of the enterprise (meaning the said Fernando Oil Company), fair and square treatment for the stockholders, and an equitable distribution of all accruing profits; whereas, in truth and in fact, as the said defendant then and there well knew and intended, the Johnson Oil Company was not a big and successful oil company, but was a purely promotional stock-selling enterprise, and that said defendant was not a successful or honest executive of any company, but was a promoter of many fraudulent enterprises and was a confidence man and swindler, and the fact that he was president and general manager of said Fernando Oil Company did not assure a competent administration of its affairs or a fair and square treatment of its stockholders, or an equitable distribution of all accruing profits, but in fact, gave assurance that there would be no distribution of money to stockholders, but that whatever profit accrued would be misappropriated and embezzled by said defendant.

A review of the foregoing makes it clear that an integral feature of the scheme to defraud was misrepresentation as to the character of the person who was handling the affairs of the company. The words complained of appear solely for the purpose of providing a negative to such misrepresenta-

tion, and alleging affirmatively in what the falsity consisted.

For instance, one engaged in a scheme to defraud might have as a dominant feature of such enterprise the representation, let us say, that a former President of the United States was actively handling the affairs of the company. If this representation were relied on, it might well prove the greatest feature of the scheme of misrepresentation. But a draftsman in preparing an indictment and charging that as part of the scheme to defraud, would not meet the requirements of the pleading if he simply were to negative the assertion that the administrative officer was a former President of the United States. If it happened, in fact, that the officer really running the enterprise, was a notorious confidence man and swindler, there surely then would devolve upon the pleader the necessity of alleging affirmatively that fact in pleading the negative of the misrepresentation.

As a matter of fact the terms complained of—"confidence man" and "swindler"—might well be eliminated from the indictment, and an inspection of the contents of this pleading still reveals, without those words in fact being used, that he still was being charged with being a swindler and a confidence man.

Even the legal definition of the word "swindler" can claim close kinship, if not absolute identity, with one who is charged with violation of Section 215:

> A swindler is one who secures or attempts to secure, a valuable right by some deceitful pretense or fraudulent representation. *Words and Phrases*, Second Series, Volume 4, page 821.

The *Standard Dictionary* defines "swindle" as follows:

> To cheat and defraud grossly, or with deliberate artifice, and further defines the word "swindler" as:
>
> One who swindles; a fraudulent schemer; cheat.

Webster defines the word as:

> One who swindles or defrauds grossly, or one who makes a practice of defrauding others by imposition or deliberate artifice.

A "confidence man" is one who with intent to cheat and defraud obtains money from any other person by means of any trick or deception or false or fraudulent representation, or statement of pretense, or any other means, or instrument, or device commonly called the confidence game. *Words and Phrases,* First Series, page 883.

It is obvious, therefore, that the term "swindler" and "confidence man" are practically synonymous. The terms import a man who, by some device, gains the confidence of another, and by such means, defrauds him of his money or property. It is likewise clear that anyone who is guilty of devising a scheme to defraud and of carrying it, or attempting to carry it, into effect, is a confidence man and

a swindler. This is particularly true in the light of the definition of fraud which the Supreme Court of the United States has repeatedly made. *Hammerschmidt* v. *United States,* 265 U. S. 182, 188; *Fasulo* v. *United States*, 272 U. S. 620, 627. In both cases that Court defines the words "to defraud" and says they mean to cheat and that they signify deprivation of something of value by trick, deceit, chicane or overreaching.

The indictment in this case charges that the appellant, by various fraudulent devices, sought to obtain the confidence of certain persons. Then having obtained the good will of these persons, it was part of the scheme to obtain their money under the representation that it would be used for proper and legitimate purposes, whereas it was the real intention at all times to appropriate the money to his own use in disregard of the rights of these persons.

It seems somewhat absurb that because the terms "swindler" and "confidence man" were used by the draftsman the defendant should feel so aggrieved, when as herein set forth, the whole document in its description of the fraudulent enterprise carries the unfailing implication that the words quoted are apt and properly descriptive.

Also appellant in this case now stands convicted of the scheme which in effect charged him with being a confidence man and a swindler. It is rather asking much of this court to reverse the judgment of the lower court because the draftsman in the

indictment alleged certain facts which the jury apparently found to be true.

But this point must be considered also in connection with the charge of the court. The defendant apparently caused character testimony to be introduced in his behalf. Keeping in mind his assertion that he was gravely prejudiced by the use of the terms "swindler" and "confidence man" in the indictment, it is interesting to note what the court had to say of this appellant in the formal charge to the jury. (R. 209.)

> You are instructed, gentlemen, that the good character of a person accused of a crime, when proven, for the traits involved in the charge—in this case, for honesty and integrity—is itself a fact in the case. It must be considered in connection with all the other facts and circumstances adduced in evidence on the trial, and if, after such consideration, the jury are not satisfied beyond a reasonable doubt of the defendant's guilt, you should acquit him. If, however, you are satisfied from all the evidence in the case, that the defendant is guilty, you are to convict him, notwithstanding proof of good character. In the Federal courts there is no presumption that the defendant is of good character. Neither is it presumed that he is of bad character.
>
> Respecting the evidence introduced by the defendant of what is known as "character evidence" or evidence of "good character," particularly as to his honesty and fair dealing with his fellow men, and also as to his

> veracity and truthfulness, you are instructed that the law is: That good character, when considered in connection with the other evidence in the case, may create a reasonable doubt. The circumstances may be such that an established reputation for good character, if it is relevant to the issue (and is of especial value in cases like the one at bar, where the element of intent to defraud is involved) such evidence would alone create a reasonable doubt, although without the other evidence would be convincing.

Considering the foregoing this court is asked by the appellant to indulge the bare presumption that he had been prejudiced in the trial of his case by the use of the terms "confidence man," "swindler," and "embezzle," whereas the record reveals that appellant was granted a generous and precise charge on the effect the jury was to accord the evidence of good character introduced in his behalf. Then again the court in its charge to the jury was most careful to point out the function of an indictment in a trial. His language is illuminating on the proposition of whether the indictment or any portion thereof could serve in any wise to prejudice the appellant in his case (R. 196):

> By the finding of an indictment no presumption whatsoever arises to indicate that a defendant is guilty, or that he has any connection with, or responsibility for, the act charged against him. A defendant is presumed to be innocent at all stages of the proceeding until all of the evidence pre-

> sented shows him to be guilty beyond a reasonable doubt. And this rule applies to every material element of the offense charged. Mere suspicion will not authorize a conviction. A reasonable doubt is such a doubt as you may have in your minds when, after fairly and impartially considering all of the evidence, you do not feel satisfied to a moral certainty of a defendant's guilt. In order that the evidence submitted shall afford proof beyond a reasonable doubt, it must be such as you would be willing to act upon in the most important and vital matters relating to your own affairs.

It is noteworthy that the appellant has failed to submit to this court in his brief any case whatsoever, Federal or State, which holds, even remotely, that the inclusion in an indictment of terms such as those complained of, is ground for reversal. It is true that appellant has cited many cases in support of these assignments of error, but there is none that appears upon even cursory inspection to have any applicability to the proposition at bar. Compare *Warfield* v. *United States,* 36 F. (2d) 903, in which similar expressions were addressed directly to the jury during argument of counsel.

II

THE INDICTMENT WAS SUFFICIENT TO ACQUAINT THE APPELLANT WITH THE CHARGE MADE AGAINST HIM.

The next point relied upon by the appellant consists of the contention that the indictment was not

drawn with sufficient certainty to acquaint the defendant with the charge against him. An inspection of the indictment itself is the best reply to this claim of error. (R., 3–42.) The scheme to defraud is not the gist of the offense, and all that is required in describing it is thus stated in *Havener* v. *United States,* 49 F. (2d) 196, 198:

> The scheme need not be pleaded with all the certainty as to time, place, and circumstances required in charging the gist of the offense. *Brady* v. *United States, supra; Cochran* v. *United States, supra; Savage* v. *United States* (C. C. A. 8) 270 F. 14, 18; *Gardner* v. *United States* (C. C. A. 8) 230 F. 575; *McClendon* v. *United States* (C. C. A. 8) 229 F. 523, 525; *Brooks* v. *United States, supra; Chew* v. *United States* (C. C. A. 8) 9 F. (2d) 348, 351; *Mathews* v. *United States* (C. C. A. 8) 15 F. (2d) 139, 143.

Certiorari in the above case was refused by the Supreme Court of the United States on October 19, 1931.

If he desired further details he should have applied for a bill of particulars. *Martin* v. *United States,* 20 F. (2d) 785, 786; *Chew* v. *United States,* 9 F. (2d) 348, 353.

There is much discussion in this connection of the case of *Beck* v. *United States,* 33 F. (2d) 107 (C. C. A. 8). Reference is had to that portion of the opinion in the Beck case dealing with the so-called "shot gun" clause. The applicability of the

Beck case seems extremely doubtful when the indictment in the case at bar is read. That document appears to have been drawn, it is respectfully submitted, with a painstaking degree of precision. In any event, the indictment would seem to be good under Section 1025, R. S. (U. S. C., Title 18, Sec. 556).

III

THE APPELLANT WAS PROPERLY INDICTED IN THE SOUTHERN DISTRICT OF CALIFORNIA.

The next point raised in appellant's brief deals with his contention of alleged unfairness of the Government in indicting appellant in the State of California, rather than in the State of Texas.

Under Section 215 of the Criminal Code, knowingly to cause a letter to be delivered by mail in accordance with the direction thereon, for the purpose of executing a fraudulent scheme, is an offense separate from that of mailing a letter or causing it to be mailed for the same purpose; and where the letter is so delivered as directed, the person who caused the mailing, causes the delivery at the place of delivery, and may be prosecuted in that district, although he was not present there. The foregoing is the holding of the Supreme Court in *Salinger* v. *Loisel,* 265 U. S. 224, 233. In that case the Supreme Court passed on a proposition precisely in accord with the contention of appellant herein. It is submitted that the citation of further authority would be unnecessarily burdensome to the court.

IV

REQUESTS OF APPELLANT FOR SPECIFIC CHARGES TO THE JURY WERE PROPERLY REFUSED.

The remaining assignments deal solely with alleged error on the part of the court in his charge to the jury. The record does not contain a transcript of the testimony or any statement of the evidence. There are sundry references to the introduction of exhibits and to the appearance for examination and cross-examination of witnesses. But what evidence was adduced either in behalf of the Government or the appellant is not stated. Therefore it would seem that in the main the questions relating to the charge are not available to the appellant without the testimony being in the record and subject to examination by the court to determine whether, on the whole, the charge meets the requirements of the law. However, comparison of the refused requests for instruction with the charge, as given, demonstrates that portions of the requested charges which are to be considered by this court as good law, were embodied in the general charge of the court.

For instance the appellant lists as error the refusal of the court to grant the following instruction (Appellant's Brief, p. 51):

> If upon a fair and impartial consideration, of all the evidence in the case, the jury finds that there are two reasonable theories

> supported by the testimony in the case, and that one of such theories is consistent with the theory that the defendant is guilty, as charged in some one or more or all of the counts in the indictment, and that the other of such theories is consistent with the innocence of the defendant, then it is the policy of the law, and the law makes it the duty of the jury to adopt that rule which is consistent with the innocence of the defendant and in such case to find the defendant not guilty.

However, with regard to the foregoing request for instruction, the appellant overlooks the fact that the charge substantially as requested was given by the trial court (R. 203):

> The defendant can not be convicted if all the testimony is as fairly consistent with his innocence as with his guilt; he can not be convicted in the absence of an actual fraudulent intent, no matter how unsuccessful the enterprise may have been or how inconsistent it may have been with sound judgment.

At pages 57, et cetera, of appellant's brief, error is assigned to the following:

> Juror HAYNES. A count, then, is just a subdivision under a particular.
>
> The COURT. Yes.

The brief, however, does not set forth the discussion between court and counsel which took place

immediately thereafter and would serve to qualify this seeming inaccuracy (R. 217):

> Mr. PRATT. I want to make this suggestion, if the Court please.
>
> The COURT. Yes, sir.
>
> Mr. PRATT. I am wondering if the juror who inquired as to the difference between a particular and a count has been confused, and may I state it?
>
> The COURT. Yes, you may.
>
> Mr. PRATT. That in this indictment, the defendant is charged with devising a scheme to defraud, and in several counts, namely, in six different counts, he is charged with causing the delivery of a specific letter to carry that scheme into effect. The scheme itself, as described in the indictment, has numerous features which the Court mentioned as various particulars, but it is one scheme. Then he is charged with what is the gist of the offense, namely, the use of the mails, causing a letter to be delivered in furtherance of that scheme. That is the first count. And in the successive counts, the same scheme is adopted and separate letters in each count are described as having been caused to be delivered in furtherance of it. I make that suggestion to perhaps clarify it in the minds of the jury.
>
> The COURT. Yes, I think your suggestion is quite kindly, and I assume that the Jury understand that the indictment charges the scheme to defraud. It gives a great many particulars, as I explained to you, which constitute what the scheme was. That is all.

V

ATTENTION DIRECTED TO SECTION 269 OF THE JUDICIAL CODE

While not conceding that even harmless error is to be discovered in any portion of the record herein, appellee begs to call the attention of the court to Section 269 of the Judicial Code (U. S. C., Title 28, 391):

> On the hearing of any bill, certiorari, writ of error, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects or exceptions, which do not affect the substantial rights of the parties.

The appellant has not demonstrated on a consideration of the whole record that he has been denied any substantial right. *Rich* v. *United States,* 271 Fed. 566, 569–570.

CONCLUSION

We respectfully submit that the judgment of the lower court should be affirmed.

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